A

Representative to the estate of Raden Benni bin RS Tanuwidjaja, deceased & Anor v Sri Mahanum bt Yup (suing as lawful widow of Mohd Yusof bin Sahak, deceased)

B

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO JA-12A-15–08 OF 2017
SEE MEE CHUN J
C 25 JUNE 2018

Labour Law — Social security — Employees Social Security Act 1969 — Death during course of employment — Respondent claimed for loss of support, bereavement and funeral expenses — Respondent claimed from Social Security Organisation and received RM1,000 per month — Whether proviso to s 31 of the Employees Social Security Act 1969 applicable — Employees Social Security Act 1969 ss 31 & 91(1)(aa)

D

E On 5 February 2015 at about 12.30pm, an accident occured near km 19 Jalan Air Papan, Tg Resang, Mersing Johor involving two motorjeeps. The respondent was the widow of Mohd Yusof bin Sahak, the deceased who was a passenger in the jeep involved. The deceased was in employment of Korakan Corp Sdn Bhd, the second appellant as the driver of both jeeps. The first
F appellant was the estate of one Raden Benni who was the driver of Jeep with registration number of WPW 4068. The respondent's claim was for the loss of support, bereavement and funeral expenses under s 7 of the Civil Law Act 1956. At the sessions court, it was agreed that the liability was 100% against the appellants and quantum for loss of support at RM57,120, bereavement at
G RM10,000 and funeral expenses at RM3,000. The respondent had also claimed from Social Security Organisation ('SOCSO') and was receiving RM1,000 per month. It was held by the sessions court judge that s 31 of the Employees Social Security Act 1969 ('the Act') did not prohibit the respondent's claim against the appellants. The appellants then appealed in the
H present case against the sessions court's decision. The issue at the present appeal was whether s 31 of the Act specifically the proviso was applicable.

Held, allowing the appeal:

I (1) The parties agreed that the death was incurred during the course of employment. Thus, this meant the respondent would not be entitled to receive any compensation or damages arising from the death which arose in the course of employment unless the plaintiff came under the proviso. It was not disputed that the deceased died in the accident in the course of employment. The respondent's claim being under s 91(1)(aa) of the Act

made it a claim not required to be insured which in turn rendered the proviso to s 31 of the Act not applicable (see paras 5, 10–11 & 24).

[Bahasa Malaysia summary

Pada 5 Februari 2015 pada jam 12.30pm, satu kemalangan telah berlaku berhampiran km 19 Jalan Air Papan, Tg Resang, Mersing Johor melibatkan dua buah jip. Responden merupakan balu kepada Mohd Yusof bin Ishak, si mati yang merupakan penumpang dalam jip yang terlibat. Si mati bekerja di Korakan Corp Sdn Bhd, perayu kedua sebagai pemandu kepada kedua-dua jip. Perayu pertama merupakan waris kepada Raden Benni, yang merupakan pemandu jip bernombor pendaftaran WPW 4068. Tuntutan plaintif adalah untuk ganti rugi sokongan, kehilangan dan perbelanjaan pengebumian di bawah s 7 Akta Undang-Undang Sivil 1956. Di mahkamah sesyen, adalah dipersetujui bahawa liabiliti sebanyak 100% terhadap perayu-perayu dan nilai kehilangan sokongan sebanyak RM57,120, ganti rugi kehilangan sebanyak RM10,000 dan perbelanjaan pengebumian sebanyak RM3,000. Responden juga telah membuat tuntutan daripada Pertubuhan Keselamatan Sosial ('PERKESO') dan telah menerima bayaran sebanyak RM1,000 sebulan. Mahkamah sesyen telah membuat keputusan bahawa s 31 Akta Pertubuhan Keselamatan Sosial 1969 ('Akta tersebut') tidak menghalang tuntutan responden terhadap perayu-perayu. Perayu-perayu kemudian membuat rayuan dalam kes semasa terhadap keputusan mahkamah sesyen. Isu dalam rayuan semasa adalah sama ada s 31 Akta tersebut secara spesifiknya proviso yang berkaitan terpakai.

Diputuskan, membenarkan rayuan:

(1) Pihak-pihak bersetuju bahawa kematian berlaku ketika tempoh bekerja. Oleh itu, ini bermaksud responden tidak berhak untuk menerima ganti rugi daripada kematian yang berlaku yang terjadi ketika tempoh bekerja melainkan responden termaktub di bawah proviso. Adalah tidak menjadi pertikaian bahawa si mati telah meninggal dunia ketika tempoh bekerja. Tuntutan responden di bawah s 91(1)(aa) Akta tersebut menjadi satu tuntutan yang tidak perlu ditanggung oleh insurans yang menyebabkan proviso kepada s 31 Akta tersebut tidak terpakai (lihat perenggan 5, 10–11 & 24).]

Notes

For a case on Employees Social Security Act 1969, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2059.

Cases referred to

Indah Water Konsortium Sdn Bhd v Govindarajan a/l Alagar @ Narayanan [2015] 8 MLJ 271; [2014] 9 CLJ 812, HC (not folld)

Pelita Rasa Sdn Bhd & Ors v Theeban Vengadesh a/l Govintarau [2015] MLJU

110; [2015] 2 CLJ 593, HC (not folld)
Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool [2017] 6 MLJ 776; [2017] 8 CLJ 682, CA (refd)

Legislation referred to

Civil Law Act 1956 s 7
Employees Social Security Act 1969 s 31
Road Transport Act 1987 ss 90, 91, 91(1), (1)(b), (1)(aa), (1)(bb), Part IV

Ong Chee Yong (CY Ong & Co) for the appellant.
Tay Cho Sing (YP Tan & Ong) for the respondent.

See Mee Chun J:

INTRODUCTION

[1] On 5 February 2015 at about 12.30pm an accident happened at near KM 19 Jalan Air Papan, Tg Resang Mersing Johor involving two motorjeeps WPW 4064 and WPW 4068. The plaintiff is the widow of Mohd Yusof bin Sahak ('the deceased') who was a passenger in jeep WPW 4064. The deceased was in the employment of Korakan Corp Sdn Bhd (second defendant, Korakan) as were the driver of both jeeps. The first defendant is the estate of one Raden Benni who was the driver of jeep WPW 4068. The plaintiff's claim is for the loss of support, bereavement and funeral expenses under s 7 of the Civil Law Act 1956.

HEARING IN THE SESSIONS COURT

[2] In the sessions court it was agreed that liability was 100% against the defendants and quantum for loss of support at RM57,120, bereavement at RM10,000 and funeral expenses at RM3,000. It was further agreed that the plaintiff had claimed from SOCSO and was receiving RM1,000 per month.

[3] It was held by the sessions court that s 31 of the Employees Social Security Act 1969 ('the SOCSO Act') does not prohibit the plaintiff's claim against the defendants. On appeal this court decided otherwise and held that s 31 of the SOCSO Act prevents the plaintiff's claim. This is the appeal by the plaintiff.

ISSUE — WHETHER S 31 OF THE SOCSO ACT APPLIES

[4] The only issue was whether s 31 of the SOCSO Act specifically the proviso applies. Section 31 of the SOCSO Act provides as follows:

31 Liability of employer and his servant

An insured person or his dependants *shall not be entitled to receive or recover* from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force *in respect of an employment injury sustained as an employee* under this Act:

Provided that *the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the road Transport Act 1987*. (Emphasis added.)

[5] In the High Court parties agreed that the death was incurred in the course of employment. This thus means that the plaintiff would not be entitled to receive any compensation or damages arising from the death which arose in the course of employment unless the plaintiff comes under the proviso.

[6] The proviso to s 31 states the prohibition against receiving compensation or damages shall not apply to any claim arising from motor vehicles where the employer or the servant of the employer is required to be insured against third party risks under Part IV of the Road Transport Act 1987 ('the RTA').

[7] Part IV of the RTA is titled 'Provisions against Third Party Risks arising out of the use of motor vehicles'. Section 90 provides that it shall not be lawful for any person to use or to cause or permit any other person to use, a motor vehicle unless there is in force an insurance policy in respect of third party risks as complies with the requirements of Part IV. Hence motor vehicle users are to be insured against third party risks.

[8] As to what are the requirements which this insurance policy in respect of third party risks must comply with, this is as provided in s 91. Section 91(1) provides as follows:

91(1) In order to comply with the requirements of this Part, a policy of insurance *must be a policy which* —

(a) is issued by a person who is an authorized insurer within the meaning of this Part; and

(b) *insures* such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:

Provided that such policy shall not be required to cover —

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

A (bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

B (cc) any contractual liability. (Emphasis added.)

[9] The scheme under the RTA envisages compulsory motor insurance and non compulsory motor insurance. This is evident from the words 'must be a policy which ... insures' (s 91(1)(b), compulsory) and then the proviso C 'provided that such policy shall not be required to cover' (non-compulsory).

[10] Going back to the proviso to s 31 of the SOCSO Act, it provides that the prohibition to a claim does not apply where the employer or the servant is required to be insured against third party risks under Part IV of the RTA which D is in essence s 91(1)(b) because the words 'must be a policy which ... insures' and which in turn is compulsory motor insurance.

[11] In this instant appeal it is not disputed the deceased died in the accident E in the course of his employment with Korakan which is the 'person insured' for both the jeeps. This brings it completely within s 91(1)(aa) which is the non compulsory motor insurance by virtue of the words 'shall not be required to cover liability in respect of the death arising out of or in the course of his employment of a person in the employment of a person insured by the policy'. F The plaintiff's claim being under s 91(1)(aa) makes it a claim not required to be insured which in turn renders the proviso to s 31 of the SOCSO Act not applicable.

[12] In *Law of Torts in Malaysia* (2nd Ed, 2003) by Norchaya Talib it is stated G in p 388:

> However, for those who are subject to the Employees' Social Security Act 1969 (SOCSO), section 31 prohibits an employee from recovering compensation or damages from his co-employee or their common employer for any personal injuries sustained by the employee due to the negligence of his co-employee. The same H applies if the employee claims directly from the employer. This is because SOCSO provides for its own compensation scheme applicable to employees registered under SOCSO.

[13] It was contended by the plaintiff's counsel the proviso to s 31 to the I SOCSO Act is a general provision and does not talk about coverage in the specific instances as in s 91(1)(aa) and s 91(1)(bb) of the RTA. However this contention does not hold as the proviso to s 31 to the SOCSO Act specifically mentions 'is required to be insured against Third Party Risks under Part IV of RTA'. Section 90 of the RTA specifically states 'an insurance policy in respect of

the third party risks as complies with the requirements in Part IV' which are in turn spelled out in s 91(1). There is thus a connection between s 31 of the SOCSO Act and s 91(1) of the RTA.

[14] Alternatively it was submitted that if the court was to accept that such liability was not required to be insured, s 91(1)(bb) of the RTA ought to apply. This is because sub-para (aa) was a general provision whereas sub-para (bb) was specific where the deceased was a passenger 'by reason of or in pursuance of a contract of employment'. The starting word 'except' meant liability was required to be insured. However the deceased was an employee of Korakan such that 'he was a person in the employment of a person insured by the policy' who happened to be a passenger in the jeep. This meant he was not merely a passenger but an employee of the insured, Korakan. Hence it follows that s 91(1)(aa) applies and not s 91(1)(bb).

[15] The plaintiff's counsel had relied on *Tirumeniyar a/l Singara Veloo v Malaysian Motor Insurance Pool* [2017] 6 MLJ 776; [2017] 8 CLJ 682 and stated that *Tirumeniyar* held as follows:

> If a person is travelling in a motor vehicle driven by the insured, arising out of and in the course of his employment with the insured, the policy does not cover him if he is injured or in case of his death.
>
> However, if the motor vehicle was at all material times driven by the authorised driver and not the insured and the authorised driver is a party to the suit, then the insurer by virtue if of the authorised driver's clause in the policy will be liable as they have agreed under the policy to indemnify the authorised driver as though he was the insured and was separately covered under the terms of the policy. As the passenger is not an employee of the authorised driver, the above 'employee' exception will not apply.
>
> In the above case of *Tirumeniyar* it was therefore held that the insurance company was liable to pay the lorry attendant as the lorry attendant was not the employee of the authorised driver and hence s 91(1)(aa) of the RTA did not apply.

[16] The above passage other than the third paragraph was referring to statement from a book by Dass *The Law of Motor Insurance*. This can be seen in the paragraph immediately above at pp 695–696 and for context is reproduced in full as follows:

> What is important to note in this case is that the purported tortfeasor is the first defendant who is the authorized driver of the second defendant. under the general law of negligence, the first defendant will be liable to the third defendant if he is found liable. The policy terms specifically state that it will indemnify the authorized driver. That is to say, not only the policy covers the relationship between the second defendant and the insurer but over and above it extends the coverage also to an authorized driver. However, RTA by itself does not prohibit the third defendant suing the first and second defendants under the common law. What RTA does is

A that it restricts the scope of insurer's liability in respect of the mandatory policy. However, if the insurer wants to give extended cover such as to cover the negligence of the first defendant, there is no prohibition under the RTA. This distinction must be kept in mind. Support for the proposition is found in books and case laws. To name a few are as follows:

B (i) Learned author S Santhana Dass in his book 'The Law of Motor Insurance' (2010) Marsden Law Book, Kuala Lumpur, at page 107 observes:

...

C **[17]** The finding of the Court of Appeal was thus in the context of the insurers having to pay as there existed a second contract where the insurers agreed to cover the authorised driver. That coverage had nothing to do with the statutory mandatory coverage in the RTA. This is evident from the earlier p 696 where it was stated:

D What RTA does is that it restricts the scope of insurer's liability in respect of the mandatory policy. However if the insurer wants to give extended cover such as to cover the negligence of the first defendant, there is no prohibition under the RTA. This distinction must be kept in mind.

E **[18]** It was also stated in p 697 that 'RTA to some extent is a social legislation attempting to provide some statutory protection to road victims. It does not prohibit greater coverage for road victims under the insurance policy terms'.

F **[19]** In that case plaintiff was the insurer of the motor lorry owned by the second defendant who was the purchaser of the insurance policy. The first defendant was the driver of the motor lorry who in an accident caused injury to the third defendant. The third defendant was a lorry attendant in the said lorry. While the first defendant was reversing the lorry it was alleged that the third G defendant was knocked down and sustained injuries.

[20] It must also be noted that *Tirumeniyar* did not deal with s 31 of SOCSO Act.

H **[21]** The cases of *Pelita Rasa Sdn Bhd & Ors v Theeban Vengadesh a/l Govintarau* [2015] MLJU 110; [2015] 2 CLJ 593 and *Indah Water Konsortium Sdn Bhd v Govindarajan a/l Alagar @ Narayanan* [2015] 8 MLJ 271; [2014] 9 CLJ 812 are not applicable.

I **[22]** In *Pelita* it was stated at p 601 (CLJ):

On the facts of this case, I therefore find and hold that the premises wherein the accident occurred is a road within the intents of the Road Transport Act 1987 and hence covered by the third party insurance required thereunder. Accordingly, the

proviso to s 31 of the Employees Social Security Act 1969 is attracted and the second defendant is liable to the plaintiff.

However the proviso does not just deal with a claim arising from a motor vehicle accident which was stated to have occurred on a public road but also where the employer or servant is required to be insured under third party risks.

[23] In *Indah Water Konsortium* it was concluded at p 278 (MLJ); p 819 (CLJ) that:

In my view the claim herein falls squarely within the exception stated in the proviso whereby the claim arises drom a motor vehicle accident. This means that the proviso to s 31 is wide enough not only to allow claim from third party but also between the employee and the insured.

Here the finding that 'the claim falls squarely within the exception to the proviso to s 31 whereby the claim arises from a motor vehicle accident' did not address the words 'required to be insured against Third Party Risks' as provided for in the proviso.

[24] Death having occurred in the course of employment meant the plaintiff's claim can only succeed if the second defendant was required to be insured. This was a situation falling under s 91(1)(aa) of the RTA where there was no requirement for insurance. The proviso to s 31 of the SOCSO Act does not apply with the ensuing outcome being that the prohibition to claim has set in.

CONCLUSION

[25] For the above reasons the defendant's appeal was allowed.

Appeal allowed.

Reported by Mohd Kamarul Anwar